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ONLY

December 23, 2021

Re: *United States v. Michelle Morton*, S3 16 Cr. 371 (RA)

Dear Judge Abrams:

We write to provide an update on Ms. Morton's health and to respectfully request that the Court adjourn Ms. Morton's surrender date, which is currently scheduled for January 10, 2022, for a period of six months, until July 10, 2022.

Ms. Morton has every intention of reporting to serve her sentence, but we respectfully submit that it is not yet safe for her to do so. As detailed below, given the current conditions related to the pandemic, as well as Ms. Morton's continued health challenges, we believe that a further adjournment of her surrender date is warranted.

BACKGROUND

I. Procedural History

On April 26, 2021, Ms. Morton requested a six-month adjournment of her surrender date in light of the fact that [REDACTED]

[REDACTED]. Dkt. No. 969. On May 4, 2021, the Court adjourned Ms. Morton's surrender date, then scheduled for May 18, 2021, to August 18, 2021, and ordered her to provide monthly updates on her health and vaccination efforts. Dkt. No. 970, at 11. Ms. Morton provided updates to the Court on June 4, 2021, July 6, 2021, and August 5, 2021. Dkt. Nos. 971, 975, 976. On August 12, 2021, the Court further adjourned Ms. Morton's surrender date to January 10, 2022. Dkt. No. 977.

II. Relevant Facts

A. The COVID-19 Omicron Variant Is More Contagious than Any Other Variant and Poses a Direct Threat to Ms. Morton

The COVID-19 Omicron variant is currently sweeping the country with breathtaking speed, making this a particularly inopportune time for the immunocompromised Ms. Morton to surrender to serve a period of incarceration.

Omicron was first detected in Africa on November 11, 2021 and was quickly classified as a Variant of Concern by both the World Health Organization and the U.S. Centers for Disease Control and Prevention (“CDC”).¹ Omicron has spread rapidly, and as of December 21, 2021, has been detected in more than 47 U.S. states, including New York, New Jersey, and Connecticut, and at least 95 countries.² On December 11, 2021, Omicron accounted for only about 12.6% of the total cases in the United States, but one week later on December 18, it made up more than 73% of reported cases.³

Although research is still underway, preliminary studies have shown that the variant is highly transmissible and appears to spread more than twice as quickly as the Delta variant, which was previously considered the most contagious version of the virus.⁴ The variant is already starting to gain a foothold in highly vaccinated populations.⁵ Its ability to spread at alarming rates even in areas with high levels of immunity can be readily seen by the number of new infections in the United Kingdom, where approximately 70% of people are vaccinated and yet new Omicron cases

¹ A variant of concern is defined as a “variant for which there is evidence of an increase in transmissibility, more severe disease (for example, increased hospitalizations or deaths), significant reduction in neutralization by antibodies generated during previous infection or vaccination, reduced effectiveness of treatments or vaccines, or diagnostic detection failures.” *SARS-CoV-2 Variant Classifications and Definitions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html> (last visited Dec. 21, 2021); see also *Tracking SARS-CoV-2 variants*, WORLD HEALTH ORGANIZATION, <https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/> (last visited Dec. 21, 2021).

² *Tracking Omicron and Other Coronavirus Variants*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/health/coronavirus-variant-tracker.html> (last visited Dec. 21, 2021).

³ *COVID Data Tracker – Variant Proportions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last visited Dec. 21, 2021).

⁴ Apoorva Mandavilli, *Omicron Variant Spreading Twice as Quickly as Delta in South Africa*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/12/03/health/coronavirus-omicron-vaccines-contagiousness.html>. Some estimate that Omicron can infect three to six times as many people as Delta, over the same time period. See Ewen Callaway and Heidi Ledford, *How bad is Omicron? What scientists know so far*, NATURE (Dec. 2, 2021; corrected Dec. 7, 2021), <https://www.nature.com/articles/d41586-021-03614-z>.

⁵ *What omicron’s fast spread could mean for the U.S. – and the world*, NPR (Dec. 10, 2021), <https://www.npr.org/sections/goatsandsoda/2021/12/10/1062498420/what-omicrons-fast-spread-could-mean-for-the-u-s-and-the-world>.

are doubling every two to three days.⁶ The same is now true in New York City.⁷ Similarly, in South Africa, reports indicate that Omicron has re-infected people who already caught and survived earlier versions of the COVID-19 virus, as well as people who have been vaccinated against it.⁸

Many experts are particularly concerned about the Omicron variant because it has an unprecedented number of genetic mutations, more than three times as many as in the Delta variant.⁹ Notably, the majority of the mutations are located in the spike protein region, which is a critical area of the virus because it allows the virus to enter and infect human cells, and is also the area targeted by key antibodies to prevent infection.¹⁰ Although studies are ongoing, preliminary research suggests that Omicron is more adept at evading the body's antibody defenses. One study has shown that Omicron is three times more likely than previous variants to cause breakthrough infections.¹¹ In addition, research has suggested that vaccinations are less effective against Omicron than Delta. For example, one South African study of people who received two doses of the Pfizer vaccine revealed that their antibodies were forty times less effective against Omicron than previous variants.¹²

Although initial reports have indicated that Omicron infections have generally been mild for vaccinated patients, it is too early to fully understand the severity of this variant, and deaths

⁶ See *id.*; see also Holly Ellyatt, *Rapid infection rate of omicron Covid variant is causing concern, as UK braces for 1 million cases*, CNBC (Dec. 9, 2021), <https://www.cnbc.com/2021/12/09/the-uk-braces-for-1-million-omicron-cases-as-covid-variant-spreads.html>.

⁷ See *'NYC Warns Worst of Omicron Surge Is Ahead But Peak Is Expected Within Weeks*, NBC NEW YORK (Dec. 20, 2021), <https://www.nbcnewyork.com/news/coronavirus/omicron-wave-strains-nyc-as-holidays-loom-will-covid-boosters-be-required-next/3459339/>; *'We've Never Seen This Before in NYC': COVID Positivity Rate Doubles in 3 Days on Omicron Spread*, NBC NEW YORK (Dec. 16, 2021; updated Dec. 17, 2021), <https://www.nbcnewyork.com/news/coronavirus/weve-never-seen-this-before-in-nyc-covid-positivity-rate-doubles-in-3-days-as-omicron-spreads/3454450/>.

⁸ Charles Schmidt, *Why Is Omicron So Contagious?* SCIENTIFIC AMERICAN (Dec. 17, 2021), <https://www.scientificamerican.com/article/why-is-omicron-so-contagious/>.

⁹ Kristen V. Brown, *Omicron Mutations Signal Vaccine Evasion, But Similar Symptoms*, BLOOMBERG (Dec. 4, 2021), <https://www.bloomberg.com/news/articles/2021-12-04/omicron-mutations-signal-vaccine-evasion-but-similar-symptoms>.

¹⁰ *Coronavirus FAQ: Help me with omicron vocab. What's immune evasion? Epistasis?* NPR (Dec. 3, 2021), <https://www.npr.org/sections/goatsandsoda/2021/12/03/1061219646/coronavirus-faq-help-me-with-omicron-vocab-whats-immune-evasion-epistasis>.

¹¹ Sarah Wild, *How the Omicron Variant Got So Many Scary Mutations So Quickly*, SCIENTIFIC AMERICAN (Dec. 3, 2021), <https://www.scientificamerican.com/article/how-the-omicron-variant-got-so-many-scary-mutations-so-quickly/>. More than 82% of adults in New York City are vaccinated, and yet in late December, the city repeatedly broke single-day records for positive tests, with cases doubling every three days. See *NYC Warns Worst of Omicron Surge Is Ahead But Peak Is Expected Within Weeks*, *supra* note 7; *'We've Never Seen This Before in NYC': COVID Positivity Rate Doubles in 3 Days on Omicron Spread*, *supra* note 7.

¹² Schmidt, *supra* note 8.

have begun to be reported.¹³ “[A]s with all variants, a lag exists between infection and more severe outcomes.”¹⁴ It can take weeks for an infection to progress to severe infection or death.¹⁵ Critically, it is difficult to predict how an immunocompromised individual like Ms. Morton would be affected if she were infected with the Omicron variant. Even before Omicron’s arrival, researchers cautioned that immunocompromised people were especially vulnerable to COVID-19,¹⁶ and previous studies have shown that immunocompromised people are “more vulnerable to being hospitalized or dying from COVID and less likely to develop strong protection from vaccination.”¹⁷

The Federal Bureau of Prisons (“BOP”) has developed a COVID-19 Modified Operations Matrix, a pandemic response plan with three modified levels of operations that reflect inmate medical isolation rate, percentage of fully vaccinated staff and inmates, and transmission rate in the county in which the facility is located.¹⁸ FCI Danbury, the facility to which Ms. Morton has been designated, is currently at the highest possible level (Level 3), which is indicative of a high level of transmission risk.¹⁹ Although the vaccination rate in federal prisons has increased, imprisonment still poses a significant and unreasonable danger to Ms. Morton’s health, given the rapid spread of the Omicron variant, its tendency to cause breakthrough infections, and

B.

¹³ See Annabelle Timsit and Lateshia Beachum, *Unvaccinated Houston man’s death may be first attributed to omicron in U.S.*, WASHINGTON POST (Dec. 21, 2021), <https://www.washingtonpost.com/nation/2021/12/21/us-omicron-coronavirus-death-first-reported/>.

¹⁴ *Covid Live Updates: C.D.C. Reports 43 Cases, No Deaths, in First Window on Omicron in U.S.*, N.Y. TIMES (Dec. 10, 2021; updated Dec. 21, 2021), <https://www.nytimes.com/live/2021/12/10/world/covid-omicron-vaccines>.

¹⁵ Sara Zhang, *Omicron’s Explosive Growth Is a Warning Sign*, ATLANTIC (Dec. 8, 2021), <https://www.theatlantic.com/health/archive/2021/12/omicron-spread-infection-severity/620948/>.

¹⁶ *Media Statement from CDC Director Rochelle P. Walensky*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Aug. 13, 2021), <https://www.cdc.gov/media/releases/2021/s0813-additional-mRNA-mrna-dose.html>.

¹⁷ Tanya Lewis, *How Immunocompromised People without Strong Vaccine Protection Are Coping with COVID* (Nov. 9, 2021), <https://www.scientificamerican.com/article/how-immunocompromised-people-without-strong-vaccine-protection-are-coping-with-covid/>.

¹⁸ *COVID-19 Modified Operations Matrix*, FEDERAL BUREAU OF PRISONS (Aug. 16, 2021), https://www.bop.gov/foia/docs/attachment2_covid19_modified_ops_matrix_2021_08_16.pdf.

¹⁹ See *id.*; *BOP COVID-19 Coronavirus – Modified Operational Levels*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Dec. 21, 2021).

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[REDACTED]

[REDACTED]

[REDACTED]

ARGUMENT

This Court should grant Ms. Morton a further adjournment of her surrender date, both due to the overwhelming transmission rates of COVID-19 as a result of the Omicron variant, and in light of Ms. Morton's serious health conditions.

The near-overnight spread of the Omicron variant alone warrants an adjournment of Ms. Morton's sentence. Since Omicron has spread rapidly, even within those communities with high vaccination rates, a crowded or enclosed prison setting will put Ms. Morton at an extremely high risk of infection and serious illness.²⁵ Additionally, since the full impact of holiday travel on community transmission has not yet been realized, it is highly likely that the risk Ms. Morton would face in prison today due to the Omicron variant will only increase, perhaps significantly, following the holidays in mid-January.

[REDACTED]

Just recently, the Department of Justice ("DOJ") itself acknowledged the novel circumstances presented by COVID for the BOP and mass incarceration. In an Office of Legal Counsel slip opinion, the DOJ announced that it would not force federal inmates who have been serving home confinement sentences under the emergency terms of the CARES Act back into correctional facilities at the end of the COVID-19 emergency period.²⁸ In these unprecedented times, the DOJ has correctly concluded that there are some circumstances under which incarceration is inappropriate. We submit that Ms. Morton's surrender date should be adjourned, following similar principles.

Ms. Morton's ongoing health concerns also pose an independent basis for granting a six-month adjournment.

[REDACTED]

²⁵ See generally Dkt. No. 976 (describing the risks that COVID-19 poses to Ms. Morton in light of her specific preexisting health conditions).

[REDACTED]

²⁸ *Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency*, U.S. DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL, at 1 (Dec. 21, 2021), <https://www.justice.gov/olc/file/1457926/download>.

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Given the above, we respectfully request that the Court grant Ms. Morton's request for an additional adjournment of her surrender date.

Respectfully submitted,

/s/ Nola B. Heller

Nola B. Heller
Julia C. Koch
Sabrina Alvarez-Correa

The Honorable Ronnie Abrams
United States District Judge
Southern District of New York
40 Foley Square, Room 240
New York, New York 10007

BY EMAIL

cc: AUSA Rebecca Mermelstein
AUSA Negar Tekei

Ms. Morton's surrender date is extended to May 9, 2022.

SO ORDERED.

A handwritten signature in blue ink, appearing to be 'R. Abrams', written over a horizontal line.

Ronnie Abrams, U.S.D.J.
December 27, 2021

EXHIBIT 1

Document Filed Under Seal Pursuant to the Court's
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